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**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

January 4, 1988

Mr. Hal H. Hood
Commissioner
Firemen's Pension Commission
3910 South I-35, Suite 235
Austin, Texas 78704

Re: RQ-1158

Dear Mr. Hood:

By letter of June 24, 1987, you asked for an Attorney General's opinion on whether the Fire Fighter's Relief and Retirement Fund is a trust fund. This fund was established pursuant to Senate Bill 411 of the 65th Legislature, now codified as article 6243e.3, V.T.C.S. Your question has arisen with regard to funds in excess of \$100,000 invested in a banking institution. You wish to know whether such fund should be treated as an irrevocable trust fund if the bank fails.

Your request for an opinion, designated RQ-1158, has recently been reassigned to me. I would like to state my understanding of your question and to request some clarification, to be sure that my research takes the right direction.

It appears to me that you are asking about depositing money belonging to the Fire Fighter's Relief and Retirement Fund in a bank insured by the Federal Deposit Insurance Corporation (F.D.I.C.). I assume you are not asking about investing the Fund in bank stock. You wish to know whether the commissioner and trustees will be able to recover funds in excess of the \$100,000 F.D.I.C. insurance limit if the depository bank fails. You believe that you will be able to recover funds in excess of the \$100,000 limit if the Fire Fighter's Relief and Retirement Fund is a trust fund.

The law establishing the Federal Deposit Insurance Corporation places the \$100,000 limit on the amount of

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deposit insured and determines when two or more deposits of one depositor should be treated as one deposit in applying that limit. 12 U.S.C. §1811, et seq.; see 12 U.S.C. §1817(i) (trust funds held by bank as fiduciary shall be insured in an amount not to exceed \$100,000 for each trust estate).

12 U.S.C. §1821 (a)(2)(A) (if officer, employee, or agent of a state is the depositor, his deposit shall be insured in an amount not to exceed \$100,000 per account). However, state law determines the rights of depositors for claims in excess of the insured amount. See V.T.C.S. art. 4986b, §4. There is state law authority that the depositor may recover its deposit in full from a failed bank if the bank was a trustee of the funds. See generally Bardin v. First State Bank of Arlington, 129 S.W.2d 1147 (Tex. Civ. App. - Fort Worth 1939, writ ref'd); see also 10 Am. Jur. 2d Banks §784 (where bank is trustee of funds deposited with it, such funds are entitled to preference over general creditors upon insolvency of bank). Thus, we need to determine whether the depository bank is a trustee of money deposited with it from the Fire Fighter's Relief and Retirement Fund.

Please let me know whether my understanding of your question is correct, and whether my initial analysis of the legal issues agrees with your understanding of the matter. I would appreciate any additional information you can provide on the question of whether the depository bank has become a trustee of money deposited with it. A copy of the depository contract would be very helpful on this question. If you can let me know the circumstances that gave rise to your request for an opinion, that would also be helpful.

Once you have provided the requested clarification, we may be able to advise you by letter, rather than formal opinion. I also might point out that you can avoid the kind of problem raised in your opinion request by limiting your deposits in any one bank to the insured amount.

Yours very truly,

Susan L. Garrison

Susan L. Garrison
Assistant Attorney General
Opinion Committee

SLG/bc